BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEREMY L. FORGEY Claimant	)	
VS.	)	
T & T MANAGEMENT CO., INC. Respondent	)	Docket No. 1,037,684
AND	)	
KANSAS RESTAURANT & HOSPITALITY ASSOCIATION Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 21, 2008, preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Larry G. Karns, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant aggravated a preexisting injury in an accident that arose out of and in the course of his employment with respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 21, 2008, Preliminary Hearing and the exhibits and the transcript of the February 11, 2008, deposition of Dr. Donald Mead and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's finding that claimant suffered an accidental injury that arose out of and in the course of his employment. Respondent argues that claimant did not sustain his burden of proving all aspects of the compensability of his claim. Respondent contends that claimant had a preexisting injury that had not been

adequately treated and from which he had never healed. Respondent argues that although claimant may have experienced an exacerbation of his low back pain, it was not caused by work but was caused by his activities of daily living.

Claimant argues that his testimony and the medical opinions of Dr. Sergio Delgado support the conclusion that his preexisting low back condition was aggravated, accelerated or intensified by his work-related accident at respondent on September 9, 2007. Accordingly, claimant requests the Board affirm the preliminary hearing Order of the ALJ.

The issue for the Board's review is: Did claimant suffer an accidental injury that arose out of and in the course of his employment?

FINDINGS OF FACT

Claimant worked for respondent in maintenance. One of his job tasks was to stock the kitchen. On September 9, 2007, claimant went down to the freezer to stock the kitchen with hamburger and buns. He reached over his head and lifted up three trays of hamburger buns that weighed about five to ten pounds and then twisted to set them down on a rack. As he did, his back went out. Claimant felt immediate pain in his back and both hips. He went down to his knees and could not move. On a level of one to ten, with ten being the most severe, claimant said his pain was about a ten. He had no pain in his back before he had the accident.

This is not claimant's first back injury. In 1998,[1] claimant fell off a roof when working for a roofing company. His employer took him to a doctor, who told him to relax for a day or so and he would be fine. Claimant said that he felt no pain when he fell off the roof and that he had landed on a pile of sand. Claimant returned to work after a couple of days and did not feel like he needed to see a doctor again. Nevertheless, some months later he began feeling intermittent tenderness in his low back. He would feel a little stiff or sore, like his back needed to be popped, and then the pain would resolve and he would be fine. His employer died shortly after the fall and claimant never received any medical treatment for his injuries, nor did he file a workers compensation claim. Claimant said his symptoms from the fall resolved but that he had other intermittent episodes of back pain. Nevertheless, he said his back pain was never as severe as what he has felt since the accident at respondent.

[1] On page 9 of the preliminary hearing transcript, claimant testified that the fall from the roof occurred in 1991. Likewise, Dr. Delgado's history mentions that claimant's accidental fall from the roof occurred in 1991. However, on pages 22-23 of the preliminary hearing transcript, claimant states that the fall occurred ten years ago, in 1998. Claimant also reported to Dr. Mead on September 11, 2007, that he had fallen off a roof about ten years earlier. For purposes of this Order, this Board Member will use 1998 as the date of claimant's fall from the roof.

After his fall from the roof, claimant continued to work in jobs such as a roofer, a painter, and insulation installer. However, in 2006 or 2007, claimant applied for social security disability benefits because of a bad lung, a bad heart, and problems with his back. His application for social security disability benefits was declined.

Claimant was seen by a chiropractor, Dr. Byron W. LeClerc, on April 5, 2006. He testified that his wife put his name in a drawing for an evaluation. Claimant complained to Dr. LeClerc of chronic back pain. Dr. LeClerc's report states that a spinal EMG showed widespread spinal subluxation. Claimant testified that Dr. LeClerc told him he had nerve damage. Claimant did not return to Dr. LeClerc for treatment.

After his accident of September 9, 2007, claimant reported his injury to his supervisor, who asked if he needed to go to the hospital. Claimant said he did and went to the emergency room on his own. Claimant gave a history that his back went out while lifting a tray of buns. Claimant also told the emergency room personnel that he had a history of chronic pain and that he had "been to lots of specialists."[2] Claimant was diagnosed with chronic back pain with exacerbation.

Two days after the accident, claimant returned to the emergency room for a recheck of his back pain. At that time, he was seen by Dr. Donald Mead, an occupational medicine physician. Claimant told Dr. Mead that 10 years earlier he had fallen off a roof and gotten hurt but his employer died, the company went out of business, and he was not able to get treatment under workers compensation. Claimant further told Dr. Mead that he had been unable to work since the fall and had filed for social security disability benefits but had been turned down. Claimant told Dr. Mead that his back had never healed from his previous injury and that very minimal, insignificant movements could put him down for days or weeks. He said he had taken a job at respondent three months earlier because he was out of money. Claimant also told Dr. Mead that he started having back discomfort again after lifting a tray of buns at work and that the symptoms were identical to those he had been having over the last few years. Claimant said that the tray he lifted weighed almost nothing and said that even something that light could trigger his back pain. Claimant said his back went out like that over and over and that anything could trigger the pain, even bending over to tie his shoe. Claimant told Dr. Mead he was interested in finding a way to get in to see a doctor and getting his back problem fixed so he could start working again.

Dr. Mead said that lifting a tray of buns from overhead and twisting and putting those down would fall within the type of activity that would exacerbate claimant's back pain. Dr. Mead said that lifting a try of buns was an activity of ordinary living and equated it with reaching for a jar of peanut butter from a top shelf. He diagnosed claimant with chronic low back pain and restricted him to sedentary work. He further opined that claimant had a preexisting back problem that was not related to his work at respondent. Dr. Mead saw

[2] P.H. Trans., Cl. Ex. 2 at 15.

claimant on just the one occasion, September 11, 2007. Apparently, when he decided the injury was not work related and, therefore, claimant was uninsured, he referred claimant to the Marian Clinic, which is a medical clinic that serves the poor and uninsured.

Dr. Sergio Delgado saw claimant on January 4, 2008, at the request of claimant's attorney, to provide an opinion concerning causation of claimant's current symptoms. Dr. Delgado reviewed the records of St. Francis Health Center, including x-rays of claimant's spine.

Claimant gave Dr. Delgado a history of developing pain in his lower back with radiation into the spine, both buttocks and upper thighs after lifting at work. He continued to be symptomatic in his low back, which was aggravated by sitting, standing, walking, bending and sneezing. Claimant said the pain was constant and not relieved by conservative treatment and medication. Claimant reported that in 1991 he injured his back and had recurrent complaints related to the low back since. He told Dr. Delgado that he had severe complaints in 2006 that were treated by a chiropractor and further that he had been to the emergency room several times because of his back complaints.

Dr. Delgado opined that claimant probably had an aggravation of a preexisting condition as a result of the injury. He recommended that claimant have an MRI. He also placed restrictions on claimant, including limiting work activities to avoid repetitive lifting, bending, stooping, and twisting, and alternating sitting and standing.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[3] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the

[3] K.S.A. 2007 Supp. 44-501(a).

[4] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

> nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[5]

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[6] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[7] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[8]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[9] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to all new and distinct accidental injuries. In *Stockman,*[10] the court attempted to clarify the rule:

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[5] *Id.* at 278.

[6] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[7] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[8] *Nance v. Harvey County*, 263 Kan. 542, 549, 952 P.2d 411 (1997).

[9] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[10] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[11] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[12] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[13]

In *Logsdon*,[14] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

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[11] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[12] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[13] *Id.* at 728.

[14] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

In *Casco*,[15] the Kansas Supreme Court stated: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

K.S.A. 2007 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.
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> (e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

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[15] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

In *Hensley,*[16] the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character.

In *Anderson*,[17] the Kansas Court of Appeals stated:

> Personal risks include those associated either with natural aging or normal day-to-day activity. Where an employment injury is clearly attributable to a personal condition of an employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. But where an injury results from the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed.
>
> An injury arises out of employment if the injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment.
>
> A manifestation of force is not necessary for an incident to be deemed an "accident" under K.S.A. 44-508(d).

The Kansas Court of Appeals, in *Johnson,*[18] held:

> In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

The court found it significant that "Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that '[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.'"[19]

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[16] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

[17] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, Syl. ¶¶ 5, 6, 8, 61 P.3d 81 (2002).

[18] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3,147 P.3d 1091, *rev. denied* 281 Kan. __ (2006).

[19] *Id.* at 788. See also *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

In *Martin*,[20] the Kansas Court of Appeals held:

> Workers compensation should be reserved for persons who are injured on the job due to hazards specifically associated with that particular work, not for persons who come to an employer with a preexisting disease and suffer the inevitable consequences of that disease while they happen to be at work.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[21] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[22]

ANALYSIS

According to claimant, immediately before the incident at work on September 9, 2007, his back was asymptomatic. Immediately after the incident, his pain was 10 on a scale of 1 to 10. Claimant had never before experienced back pain as severe as it was on September 9, 2007. Claimant had injured his back in 1998, but he continued to perform manual labor jobs, including roofing, painting, and installing insulation. Claimant denies having sought medical treatment for his back in 1998 or at any time thereafter, other than a single visit to a chiropractor in 2006. That visit was the result of a free offer and was not something that claimant would otherwise have pursued.

Conversely, the medical records and statements that claimant gave his physicians present a very different history. On September 9, 2007, claimant told the doctor at St. Francis Health Center that he had chronic back pain and had seen "lots of specialists."[23] Later, claimant told Dr. Mead that he had a history of severe low back pain. These incidents were intermittent but could occur with little warning and could result from minimal activities, such as bending over to tie his shoes. Under such circumstances, he could be disabled for days or even weeks due to pain. Claimant even gave a different work history, one that had him performing very little work after his 1998 injury. Claimant also applied for social security disability benefits in 2006 or 2007, alleging an inability to work due to a variety of conditions that included his back. When presented with this history, Dr. Mead concluded that claimant's condition was not work related. Similarly, although claimant told

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[20] *Martin v. CNH America LLC*, No. 97,707, unpublished Court of Appeals opinion filed Nov. 16, 2007, 2007 WL 4105361 (Kan. App.)

[21] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[22] K.S.A. 2007 Supp. 44-555c(k).

[23] *Supra* note 2.

Dr. Delgado that he had continued working construction after his 1998 fall, he nevertheless also said that he required chiropractic and emergency room treatments on several occasions for recurring back pain before the September 9, 2007, incident. It is difficult, if not impossible, to reconcile these different versions of events. It appears that claimant was either not truthful with the physicians or he was not truthful at the preliminary hearing, or both.

Whether claimant's accident on September 9, 2007, constituted a new injury as a compensable aggravation of a preexisting condition or was instead a personal risk depends in part upon which history is correct–the one claimant gave at the preliminary hearing or the one in the medical records, in particular the records of St. Francis Health Center and Dr. Mead. The ALJ, while acknowledging the contradictory evidence, nevertheless awarded claimant preliminary benefits. It is not entirely clear whether the ALJ believed claimant's testimony at the preliminary hearing over that contained in the medical records or whether he decided the claim was compensable under either scenario. For purposes of this preliminary hearing, it is this Board Member's finding that claimant performed substantial gainful employment after his injury in 1998 and before he went to work for respondent in 2007. Those jobs included roofing, painting, construction, and factory work. The names of several of these employers are provided in claimant's testimony and, therefore, would be easily verifiable.

Claimant has alleged that he suffered a specific traumatic injury on September 9, 2007, while reaching, lifting and twisting. Respondent does not dispute that claimant was injured at work but argues claimant's injuries resulted merely from an activity of day-to-day living and it resulted solely from a personal risk, a preexisting physical abnormality or condition. Disabilities that result from activities of day-to-day living are not compensable because they result from a personal risk.

The statutory definition of "injury" excludes disabilities that are shown to be the result of the natural aging process or the "normal activities of day-to-day living." The burden to show a disability is the result of the natural aging process or the normal activities of day-to-day living is upon the respondent.

Although reaching, lifting and twisting can be described as a normal activity of day-to-day living, K.S.A. 44-2007 Supp. 508(e) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. In this sense, it is another way of excluding personal risks from coverage under the Workers Compensation Act.

The Board has long concluded that the exclusion of disabilities resulting from the normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holding in *Boeckmann.*

Claimant's job requires a significant amount of physical activity. The court in *Boeckmann* distinguished from its holding those cases where "the injury was shown to be sufficiently related to a particular strain or episode of physical exertion" to support a finding of compensability.[24] Similarly, the court in *Johnson* distinguished its holding from cases where the injury is "fairly traceable to the employment."[25] This Board Member concludes that the Legislature did not intend for the "normal activities of day-to-day living" to be so broadly defined as to exclude disabilities caused or aggravated by the strain or physical exertion of work.

Claimant had worked for respondent for approximately two months before this incident. There is no evidence that claimant had any work restrictions or job tasks that he could not perform. The record fails to establish that claimant was under any active or ongoing treatment for his back. To the contrary, the only record of a prior treatment is the single visit to a chiropractor over a year before, in April 2006. Furthermore, the mechanism of injury, the reaching, lifting and twisting, followed by an immediate onset of pain, is consistent with an accident. Dr. Delgado diagnosed an aggravation of a preexisting condition. Both Dr. Mead and Dr. Delgado recommended work restrictions and further treatment.

Based upon the record presented to date, this Board Member finds that claimant's current need for medical treatment and inability to work is due to the accident and resulting back injury on September 9, 2007.

CONCLUSION

Claimant suffered accidental injury that arose out of and in the course of his employment with respondent. His accident and resulting disability are directly attributable to his work. Although claimant's injury is an aggravation of a preexisting condition, it did not result from a personal risk or the normal activities of day-to-day living.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated February 21, 2008, is affirmed.

IT IS SO ORDERED.

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[24] *Boeckmann*, 210 Kan. at 737.

[25] *Johnson*, 36 Kan. App. 2d at 789.

Dated this _____ day of April, 2008.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Larry G. Karns, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge